

1 ANNE M. BEVINGTON (SBN 111320)
SHAAMINI A. BABU (SBN 230704)
2 ANJULI M. CARGAIN (SBN 270546)
SALTZMAN & JOHNSON LAW CORPORATION
3 44 Montgomery Street, Suite 2110
San Francisco, CA 94104
4 (415) 882-7900
(415) 882-9287 – Facsimile
5 abevington@sjlawcorp.com
sbabu@sjlawcorp.com
6 acargain@sjlawcorp.com
Attorneys for Plaintiffs
7
8

9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 PENSION PLAN FOR PENSION TRUST
FUND FOR OPERATING ENGINEERS;
12 RICHARD PIOMBO and RUSSELL E.
BURNS, as Trustees,

13 Plaintiffs,

14 vs.

15 VALLEY ISLE EQUIPMENT RENTAL,
INC., CHARLIE'S UNDERGROUND AND
16 INSTALLATION AND CONSTRUCTION,
INC., CHARLES R. RODRIGUES, an
17 Individual; and DOES 1-10,

18 Defendants.
19

Case No.:

COMPLAINT

20 **INTRODUCTION**

21 This action arises under the Employee Retirement Income Security Act of 1974
22 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C
23 §§1001-1461 (1982). In order to protect plan participants and the Federal Pension Benefit
24 Guaranty Corporation, effective September 26, 1980, Congress created withdrawal liability for
25 employers that withdraw from multiemployer pension plans. Due to the importance Congress
26 attributed to those goals, it included two special provisions not generally available to creditors to
27 ensure that withdrawal liability could actually be collected.
28

1 Under ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1), all trades or businesses under
2 common control are to be treated as a single employer. As stated by the Ninth Circuit in *Bd. of*
3 *Trs. of W. Conf. Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987),
4 the purpose of this provision was “to prevent businesses from shirking their ERISA obligations
5 by fractionalizing operations into many separate entities.” The Ninth Circuit again emphasized
6 in *Bd. of Trs. of W. Conf. Pension Trust Fund v. LaFrenz*, 837 F.2d 892, 894 (9th Cir. 1988) that
7 “the point of section 1301(b)(1) is simply to prevent the controlling group of a company from
8 avoiding withdrawal liability by shifting corporate assets into other business ventures under its
9 control.”

10 Defendant Valley Isle Equipment Rental, Inc. (“VIER”) is incorporated in Hawaii and
11 was a participating employer in the Pension Plan for Pension Trust Fund for Operating Engineers
12 (“Plan”). On August 1, 2010, Defendant VIER withdrew from participation in the Plan which
13 thereby triggered the Plan to assess withdrawal liability against Defendant VIER and all
14 members of its controlled group, for the sum of \$1,065,324.00, under ERISA §4203, 29 U.S.C.
15 §1383. By letter dated January 26, 2015, (“Assessment”), Plaintiffs notified Defendants VIER,
16 Charlie’s Underground Installation and Construction, Inc. (“CUIC”), their principal Charles R.
17 Rodrigues (“Rodrigues”), and all members of VIER’s controlled group of the assessed
18 withdrawal liability. On June 15, 2015, Plaintiffs notified Defendants and all members of VIER’s
19 controlled group in writing that VIER and its controlled group would be in default if they failed
20 to cure their delinquent installment payments within sixty (60) days pursuant to ERISA
21 §4219(c)(5), 29 U.S.C. §1399(c)(5).

22 Defendant CUIC is incorporated in Hawaii and is not a participating employer in the
23 Plan. Defendant Rodrigues is the sole shareholder of CUIC. Defendant Rodrigues, CUIC and
24 VIER are within the same controlled group and thus are jointly and severally liable for the
25 withdrawal liability.

26 Defendant Rodrigues and his spouse are the owners of real property located at 138 Kio
27 Loop, Kihei, HI 96753 (“Kihei Property”). Defendants VIER and CUIC operated at the Kihei
28 Property. Therefore, Defendant Rodrigues operated a trade or business consisting of real estate

1 leasing related to the Kihei Property (referred to herein as the “Kihei Commercial Leasing
2 Partnership”). Defendants VIER and Rodrigues, as the 100% owner of the Kihei Commercial
3 Leasing Partnership, are within the same controlled group and thus are jointly and severally
4 liable for the withdrawal liability.

5 As of the filing of this Complaint, Defendants are in default on the outstanding
6 withdrawal liability. Plaintiffs therefore, seek a money judgment against Defendants VIER,
7 CUIC, and Rodrigues, as an individual, and each member of Defendant VIER’s controlled group
8 for an award of the entire assessed withdrawal liability less any credits for recoveries received
9 prior to judgment, plus interest, liquidated damages, attorneys’ fees and costs. Plaintiffs also seek
10 injunctive relief against Defendants VIER, CUIC, and Rodrigues, for failure to provide adequate
11 information relating to any members of Defendant VIER’s controlled group under ERISA
12 §4001(b)(1), 29 U.S.C. §1301(b)(1), and any transactions to evade its withdrawal liability under
13 ERISA §4212, 29 U.S.C. §1392.

14 PARTIES

15 1. The Plan is an employee benefit plan as defined in ERISA §3(3), 29 U.S.C.
16 §1002(3), an “employee benefit pension plan” as defined in of ERISA §3(2), 29 §U.S.C.
17 1002(2); and a “multiemployer plan” as defined in ERISA §§ 3(37) and 4001(a)(3), 29 U.S.C.
18 §§1002(37) and 1301(a)(3). The Plan is jointly administered and is maintained pursuant to the
19 Labor Management Relations Act §302(c), 29 U.S.C. §186(c).

20 2. Plaintiffs Richard Piombo and Russell E. Burns are members of the Board of
21 Trustees of Plan, the “plan sponsor” within the meaning of ERISA §§3(16)(B)(iii) and
22 4001(a)(10)(A), 29 U.S.C. §§1002(16)(B)(iii) and 1301(a)(10)(A). They are therefore,
23 fiduciaries of the Plan under ERISA §§3(21)(A) and 402(a), 29 U.S.C. §1002(a). As Trustees of
24 the Plan, they are empowered to bring this action on behalf of the Plan pursuant to ERISA
25 §4301(a)(1) - (b) and §502(a)(3), 29 U.S.C. §§1132(a)(3) and 1451(a)(1) - (b).

26 3. Defendant VIER is a Hawaii corporation with its principal place of business
27 located at the Kihei Property. Defendant VIER is an employer within the meaning of ERISA
28 §3(5), 29 U.S.C. §1002(5) and National Labor Relations Act (“NLRA”) §2(2), 29 U.S.C.

1 §152(2), and is engaged in an industry affecting commerce within the meaning of ERISA
2 §§3(11) and (12), 29 U.S.C. §§1002(11) and (12).

3 4. Plaintiffs are informed and believe that, at all relevant times, Defendant
4 Rodrigues owned 80% or more of the voting shares of Defendant VIER.

5 5. Defendant CUIC is a Hawaii corporation with its principal place of business
6 located at the Kihei Property. Defendant CUIC is an employer within the meaning of ERISA
7 §3(5), 29 U.S.C. §1002(5) and National Labor Relations Act ("NLRA") §2(2), 29 U.S.C.
8 §152(2), and is engaged in an industry affecting commerce within the meaning of ERISA
9 §§3(11) and (12), 29 U.S.C. §§1002(11) and (12).

10 6. Plaintiffs are informed and believe that, at all relevant times, Defendant
11 Rodrigues owned 80% or more of the voting shares of Defendant CUIC. Thus, Defendants VIER
12 and CUIC are treated as a single employer under common control and are jointly and severally
13 liable for Defendant VIER's withdrawal liability pursuant to ERISA §4001(b)(1), 29 U.S.C.
14 §1301(b)(1).

15 7. Plaintiffs are informed and believe that, at all relevant times, Defendant
16 Rodrigues owned and operated a trade or business by leasing the Kihei Property to Defendants
17 VIER and CUIC. Plaintiffs believe that, at all relevant times, Rodrigues and his spouse owned a
18 100% interest in the Kihei Property and therefore the Kihei Property is owned 100% by Charles
19 Rodrigues as a result of spousal attribution. ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1), and 26
20 C.F.R. 1.414(c)-4(b). Thus, Defendants VIER and the Kihei Commercial Leasing Partnership are
21 treated as a single employer under common control and are jointly and severally liable for
22 Defendant VIER's withdrawal liability pursuant to ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1).

23 8. Defendants DOES 1 through 10 are entities and/or other persons that are within
24 the same controlled group as Defendant VIER under ERISA §4001(b)(1), 29 U.S.C.
25 §1301(b)(1). Defendants VIER, CUIC, and Rodrigues have failed to provide sufficient
26 information regarding the identities of entities and persons within the same controlled group as
27 Defendant VIER as requested by Plaintiffs in accordance with ERISA §4219(a), 29 U.S.C.
28 §1399(a). Thus, Plaintiffs presently do not know the identities of such entities or persons.

1 Plaintiffs are using fictitious names for the Defendants because Plaintiffs are unable to ascertain
2 their true identity at this time. Pursuant to Fed. R. Civ. Proc. 15(a), Plaintiffs will amend the
3 Complaint to add the true name of the additional defendants once their identities are discovered.

4 JURISDICTION

5 9. Jurisdiction is conferred upon this Court over the claims asserted by the Plaintiffs
6 by virtue of ERISA §§4301(c) and 502(e)(1) and (f) of ERISA, 29 U.S.C. §§1451(c) and
7 1132(e)(1) and (f). Plaintiffs seek to enforce the provisions of ERISA and the terms of the Plan,
8 redress Defendants' violations of ERISA, and all other appropriate legal or equitable relief under
9 ERISA.

10 VENUE

11 10. Venue is conferred upon this Court by ERISA §§4301(c) and 502(e)(1), 29 U.S.C.
12 §§1451(d) and 1132(e)(2). Where an action is brought under ERISA §§4301 and 502, 29 U.S.C.
13 §§1451 and 1132 in a district court of the United States, it may be brought at Plaintiffs'
14 discretion, in the district where the Plan is administered, where the breach took place, or where a
15 defendant resides or may be found. Process may be served nationwide in any district where a
16 defendant resides or may be found. The Plan, on whose behalf the Trustees brings this action, is
17 administered in this district at its principal place of business in Alameda, California. Thus,
18 jurisdiction and venue are properly grounded with this Court.

19 FACTUAL ALLEGATIONS

20 11. Defendant VIER was a participating employer in the Plan pursuant to a collective
21 bargaining agreement ("Bargaining Agreement") with the Operating Engineers Local Union 3
22 ("Union"). The Union is a labor organization as defined in of the NLRA §2(5), 29 U.S.C.
23 §152(5) that represents employees in an industry affecting interstate commerce. Defendant LCPI
24 was obligated to and did make contributions to the Plan on behalf of their employees that were
25 covered under that Bargaining Agreement.

26 12. On August 10, 2010, Defendant VIER made a complete withdrawal under ERISA
27 §4203, 29 U.S.C. §1383, from participation in the Plan.

28 13. By written notice dated January 26, 2015, Plaintiffs notified Defendants VIER,

1 CUIC, and Rodrigues, and all members of VIER's controlled group, of the withdrawal liability
 2 assessed pursuant to ERISA §§4201-4203, 29 U.S.C. §§1381, et seq. Specifically, the Plan
 3 notified Defendants of the following in its notice dated January 26, 2015, which is attached
 4 hereto as Exhibit 1:

5 (a) The Plan had a fiscal year running from January 1 through December 31
 6 and therefore, the withdrawal liability is calculated as of December 31, 2009, as required by
 7 ERISA §4211(b)(2)(A), 29 U.S.C. §1391(b)(2)(A).

8 (b) The withdrawal liability of Defendant VIER in the amount of
 9 \$1,065,324.00 could be paid lump sum or in quarterly installments as follows:

\$58,657.01	March 1, 2015
\$58,657.01	June 1, 2015
\$58,657.01	September 1, 2015
\$58,657.01	December 1, 2015
\$58,657.01	each successive quarter through March 1, 2020
\$3,204.08	June 1, 2020

14 (c) Defendants had the option of challenging the calculation of the withdrawal
 15 liability by requesting review within ninety (90) days from receiving the notice of the withdrawal
 16 liability assessment as provided by ERISA §4219(b)(2), 29 U.S.C. §1399(b)(2).

17 (d) Any dispute concerning a determination of withdrawal liability must be
 18 resolved through arbitration provided that the employer requested review and arbitration was
 19 timely initiated under ERISA §4221(a), 29 U.S.C. §1401(a).

20 (e) Information and documents regarding all trades and businesses under
 21 common control with Defendant VIER were required to be provided within thirty (30) days
 22 pursuant to ERISA §4219(a), 29 U.S.C. §1399(a).

23 14. In order to initiate arbitration under section ERISA §4221(a)(1), 29 U.S.C.
 24 §1401(a), an employer must first request review of the assessed withdrawal liability. Section
 25 XIV of the Plan's Withdrawal Liability Procedures mirrors ERISA §4219(b)(2)(A), 29 U.S.C.
 26 §1399(b)(2)(A) which requires an employer's request for review to be in writing. VIER, CUIC,
 27 and Rodrigues, as an individual, failed to request review, and therefore they are precluded from
 28 initiating arbitration, and the time to do so has expired.

15. Defendants failed to make any of the required quarterly installment payments or provide sufficient information regarding controlled group members.

16. On June 15, 2015, Plaintiffs notified Defendants in writing that Defendants would be in default if they failed to cure their delinquent installment payments within sixty (60) days pursuant to ERISA. As of the filing of this Complaint, Defendants failed to cure the delinquency and thus, are in default under ERISA §4219(c)(5).

FIRST CAUSE OF ACTION
Against Defendants for Violation of ERISA §4219, 29 U.S.C. §1381:
Request for Payment of Withdrawal Liability, Interest,
Liquidated Damages, Attorneys' Fees and Costs

17. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 16, above.

18. On August 1, 2010, Defendant VIER made a "complete withdrawal" from the Plan as that term is defined in ERISA §4203, 29 U.S.C. §1383, et seq.

19. Plaintiffs are informed and believe that, at all relevant times, Defendant Rodrigues owned 80% or more of the voting shares of Defendant VIER.

20. Plaintiffs are informed and believe that, at all relevant times, Defendant Rodrigues owned 80% or more of the voting shares of Defendant CUIC. Thus, Defendants VIER and CUIC are treated as a single employer under common control and are jointly and severally liable for Defendant VIER's withdrawal liability pursuant to ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1).

21. Rodrigues, as an individual, owned and operated a trade or business by leasing the Kihei Property to VIER and CUIC. Thus, VIER and the Kihei Commercial Leasing Partnership are treated as a single employer under common control and are jointly and severally liable for Defendant VIER's withdrawal liability pursuant to ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1).

22. On January 26, 2015, Plaintiffs assessed withdrawal liability against Defendants VIER, CUIC, Rodrigues, and all members of VIER's controlled group.

23. To date, the delinquent quarterly installment payments have not been received by the Plan from Defendants. In addition, Defendants failed to cure their delinquent installment payments within sixty (60) days after written notice from the Plan and therefore are in default

1 under ERISA §4219(c)(5), 29 U.S.C. §1399(c)(5) , and the entire unpaid withdrawal liability,
2 plus accrued interest on the entire unpaid amount from March 1, 2015, is due.

3 24. Accordingly, Plaintiffs seek judgment against Defendants for the entire amount of
4 the unpaid withdrawal liability of \$1,065,324.00, plus accrued interest from the due date of the
5 first delinquent payment pursuant to ERISA §§4219(c)(5) and 502(g)(2), 29 U.S.C. §§1399(c)(5)
6 and 1132(g)(2).

7 25. ERISA §4301(b), 29 U.S.C. §1451(b) provides that an action involving an
8 employer's failure to timely make withdrawal liability payments shall be treated in the same
9 manner as a delinquent contribution within the meaning of ERISA §515, 29 U.S.C. §1145.
10 Thus, Defendants are also liable for liquidated damages and costs, including reasonable
11 attorneys' fees, pursuant to ERISA §§4301(b) and 502(g)(2), 29 U.S.C. §§1301(b) and
12 1132(g)(2). The Plan provides for interest at the rate of 10% simple interest per annum and for
13 liquidated damages in an amount equal to the greater of interest or 20% of the unpaid withdrawal
14 liability.

15 26. Plaintiffs, therefore, seek a money judgment against Defendants for an award of
16 the entire balance of the unpaid withdrawal liability less any credits for recoveries received
17 before the time of judgment, plus interest, an amount equal to the greater of liquidated damages
18 or interest, and costs, including attorneys' fees.

19 **SECOND CAUSE OF ACTION**

20 **Against Defendants for Violation of ERISA §4219(a), 29 U.S.C. §1399(a): 21 Failure to Provide Required Information under ERISA**

22 27. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 26, above.

23 28. In violation of ERISA §4219(a), 29 U.S.C. §1399(a), Defendants have failed to
24 provide the Plan with all necessary information relating to any member within Defendant
25 VIER's controlled group under ERISA §4001(b)(1), 29 U.S.C. §1301(b)(1) and any transactions
26 to evade its withdrawal liability under ERISA §4212, 29 U.S.C. §1392.

27 29. The failure of Defendants to make the quarterly withdrawal liability payments and
28 provide information regarding controlled group members in accordance with ERISA
§4219(c)(2), 29 U.S.C. §1399(c)(2) has caused the Plan to sustain loss of investment income and

1 incur administrative and legal expenses.

2 30. Defendants' failure to comply with the law has caused the Plan to suffer
3 immediate, continuing, and irreparable injury, and Plaintiffs are without an adequate remedy at
4 law.

5 31. Due to Defendants' failure to provide sufficient information, Plaintiffs are
6 required to name its unknown controlled group members and parties who engaged in transactions
7 to evade its withdrawal liability as fictitious defendants until their true identities can be
8 discovered.

9 32. Thus, injunctive relief as prayed for below is proper.

10 PRAYER

11 WHEREFORE, Plaintiffs pray for the following relief:

12 1. For a judgment providing that Defendants as well as all other members of
13 Defendant VIER's controlled group are jointly and severally liable to immediately pay to
14 Plaintiffs the following sums:

15 (i) The unpaid withdrawal liability of \$1,065,324.00, less any credits for
16 recoveries received before the time of judgment;

17 (ii) Interest at the rate of 10% simple interest per annum pursuant to ERISA
18 §§4219(c)(5)-(6) and 502(g)(2), 29 U.S.C. §§1399(c)(5) and (6) and 1132(g)(2);

19 (iii) Pursuant to ERISA § 502(g)(2)(C), 29 U.S.C. § 1132(g)(2)(C), liquidated
20 damages equal to the greater of:

21 (a) The accrued interest on the unpaid withdrawal liability at the time
22 of judgment, or

23 (b) An amount equal to twenty percent (20%) of the amount of
24 unpaid withdrawal liability; and

25 (iv) Attorneys' fees and costs incurred by Plaintiffs in connection with this
26 action as permitted by ERISA §§4301(e) and 502(g), 29 U.S.C. §§1451(e) and 1132(g).

27 2. For injunctive relief ordering Defendants to provide documentation of all trades
28 or businesses which are within VIER's controlled group as defined in ERISA §4001(b)(1), 29

1 U.S.C. §1301(b), and any transactions to evade its withdrawal liability under ERISA §4212, 29
2 U.S.C. §1392.

3 3. Such other relief as this Court deems appropriate.
4

5 Dated: January 14, 2016

SALTZMAN & JOHNSON
LAW CORPORATION

7 By: /S/ Anjuli M. Cargain
8 Anjuli M. Cargain
9 Attorneys for Plaintiffs
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28